Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Case No. 79-47

DONALD T. EMERY,

Petitioner,

—v.—

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1978

Case No. _____

DONALD T. EMERY,

Petitioner,

v.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner Donald T. Emery prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court dismissing petitioner's appeal for want of substantial constitutional question. The dismissal of petitioner's appeal by the Ohio Supreme Court thereby affirmed the judgment of the Ohio Court of Appeals - Eighth District, which had affirmed petitioner's convictions on two counts of trafficking in drugs.

OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth respectively, in the Appendix at 19 and 18 .

The judgment and opinion of the Ohio Court of Appeals - Ninth Appellate District, is unreported and is set forth in the Appendix at 20-32. The journal entries of the Court of Common Pleas of Wayne County, Ohio, the trial court, are set forth in the Appendix at 33-36.

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as of right was announced on January 17,1979, Appendix at 19.Petitioner's motion for rehearing was denied by the Ohio Supreme Court on March 2, 1979, Appendix at 18. On May 21, 1979, Mr. Justice Stewart, upon application by petitioner, granted an order extending the time within which to file a petition for a writ of certiorari to and including July 10, 1979, Appendix at 17.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in the State of Ohio in which a decision in this case could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257 (3) because rights, priviledges, and immunities under the Constitution of the Unites States are claimed to have been violated.

QUESTION PRESENTED FOR REVIEW

Where, in a state criminal prosecution for drug trafficking, the defendant alleges that he was entrapped into committing the offense and testimony from prosecution and defense witnesses demonstrates that law enforcement officers instigated and induced the criminal violation, does a jury instruction by the trial court that proof of predisposition by credible evidence will

negate entrapment thereby violate defendant's due process rights under the Fourteenth Amendment to the United States Constitution by relieving the prosecution of the burden of proving all of the facts constituting the elements of the offense beyond a reasonable doubt?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the pertinent portion of the Fourteenth Amendment to the United States Constitution is set forth in the Appendix at 39. The text of Ohio Revised Code §2925.03 is set forth in the Appendix at 40-46.

STATEMENT OF THE CASE

Petitioner Donald T. Emery was convicted on February 18, 1978, of two counts of Trafficking in Drugs by a jury in the Common Pleas Court of Wayne County, Ohio. Petitioner was sentenced by the trial court to a concurrent sentence of two (2) to ten (10) years inprisonment for each conviction. The judgment and sentence of the trial court were affirmed by the Ohio Court of Appeals - Ninth Appellate District. Petitioner's appeal to the Ohio Supreme Court subsequently was dismissed for want of substantial constitutional question and rehearing was denied.

At trial, charged with the sale of approximately twenty-three (23) grams of marijuana resin concentrate (T.108).[1/]

1/ All references to the transcript of the proceedings in the trial court will be referred to by the letter "T", followed by the page number(s).

and approximately seven (7) grams of a powder containing cocaine (T.129), petitioner Emery introduced evidence, on cross examination of prosecution witnesses and through direct examination of defense witnesses, that he had an unblemished reputation and had been entrapped by state drug enforcement agents (See, e.g.T.59 - 91, 97 - 100, 152 - 164, 179 - 190, 195 - 197, 208 - 234, 243 - 250). Petitioner's evidence showed that after repeated, persistent entreaties by the drug agent Smith, petitioner relented and agreed to obtain the drugs "to get this man off my back" (T.250).

At the close of evidence, the trial court instructed the jury on the law (T. 304 - 316) including the elements of the crimes and the concept of entrapment. For each violation, the trial court instructed that the jury had to find beyond a reasonable doubt that "the defendant knowingly sold . . . " the specific controlled substances (T.307,308). The court also included an instruction on "purpose" (T.312). The trial court began its instruction on entrapment by stating that:

> "The defendant denies that he formed a purpose to commit a crime. He claims that he is excused because he was unlawfully entrapped by the undercover agent." (T.310)

In its explanation of the meaning of entrapment, the trial court noted that:

> "A person is not entrapped when officers, for the purpose of detecting crime, merely present a defendant with the opportunity to commit an offense."

However, the trial court concluded its

remarks on entrapment by instructing that:

> "If you find by credible evidence that the defendant had the predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped (T.311) (emphasis added).

Petitioner's objections to the trial court's entrapment-burden of proof instructions were entered prior to the reading of the instructions to the jury (T.265) and were later renewed (T.316). On appeal to the Ohio Court of Appeals - Ninth Appellate District, petitioner assigned as error the trial court's instruction relieving the prosecution of the burden of proving predisposition beyond a reasonable doubt (Appendix at 38). Petitioner specifically argued in his brief before the court of appeals concerning that assignment of error (Brief at 11) that "the reasonable doubt standard of proof has constitutional stature. In re Winship, 297 U.S. 358 (1970)."

On appeal to the Ohio Supreme Court, petitioner again assigned as error in the propositions of law submitted to the court the instruction on the burden of proving predisposition (Appendix at 37). In the jurisdicitonal memorandum submitted to the Ohio Supreme Court, petitioner reiterated that "'the reasonable doubt' standard of proof has constitutional stature. In re Winship, 297 U.S. 358 (1970)" (Memorandum at 7). However, the Ohio Supreme Court, without opinion, dismissed petitioner's appeal for want of substantial constitutional question (Appendix at 19) and later denied, without opinion, petitioner's application for rehearing (Appendix at 18).

REASONS FOR GRANTING WRIT

AN IMPORTANT QUESTION IS PRESENTED FOR REVIEW CONCERNING THE APPLICATION OF THE DUE PROCESS PRINCIPLES ENUNCIATED IN IN RE WINSHIP, 397 U.S. 358 (1970) AND MULLANEY V. WILBUR, 421 U.S. 684 (1975) TO A STATE CRIMINAL PROSECUTION WHERE ENTRAPMENT IS ALLEGED BUT THE JURY IS INSTRUCTED THAT PROOF BY "CREDIBLE EVIDENCE" OF PREDISPOSITION WILL NEGATE THE QUESTION OF ENTRAPMENT.

This Court should grant a writ of certiorari in the instant case to resolve the confusion and uncertainty which presently exists among state and federal courts concerning the application of the due process requirement of proof beyond a reasonable doubt in criminal proceedings.

The Court, in the case of In Re Winship, 397 U.S. 358 (1970), involving the review of a state juvenile proceeding, firmly announced that,

> "Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id., at 365.

In the subsequent cases of Mullaney v. Wilbur, 421 U.S. 684 (1975) and Patterson v. New York, 432 U.S. 197 (1977), which involved state criminal proceedings, this Court adhered to the principal enunciated in Winship, supra. Accord, Sandstrom v. Montana, ___ U.S. ___, 47 U.S.L.W. 4719 (June 19, 1979, No. 78-5384).

However, in Patterson v. New York, supra, the Court held that the New York murder law did not place an unconstitutional burden of proof upon the defendant by requiring the defendant to prove the affirmative defense of extreme emotional disturbance, as defined by New York law. The basis for the Court's holding was the specific language of the New York statute which defined murder only "as causing the death of another person with intent to do so." 432 U.S. at 205.

Mullaney v. Wilbur, supra, was narrowly distinguished by the Court in Patterson on the basis that, in Mullaney, the Maine murder law included malice aforethought as an element of the crime of murder and, under Maine law, malice aforethought was considered inconsistent with the heat of passion on sudden provocation; if one were proved, the other would be negated. 432 U.S. at 213, 215-216. In Mullaney, pursuant to Maine law, malice was presumed and the burden of proof was shifted to the defendant to negate that element by proving by a preponderance of the evidence that he acted with heat of passion upon sudden provocation.

The Court in Patterson found the presumption of malice and its connection, under Maine law, with the absence of heat

of passion to be the controlling distinction between the Maine and New York law. Because the New York statute did not employ the common law language of malice but required only proof of facts of "the death, the intent to kill and causation", 432 U.S. at 205, the Court reasoned that proof of the New York affirmative defense of extreme emotional disturbance was a separate issue from the facts constituting the New York crime of murder. 432 U.S. at 207. Despite the Court's analysis in Patterson, the Maine and New York law were so close and the distinctions drawn were so fine that the dissent in Patterson commented:

> "The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's." 432 U.S. at 221.

As a result of the Patterson decision, trial courts are faced with a test which appears based on largely narrow semantic distinctions. Consequently, the trial and appellate courts are left without guidance on a point which arises in virtually every criminal proceeding.[2/] State courts are confronted with defendants who argue that jury instructions incorrectly place the burden of proof on certain issues on the defendant, or improperly lessen the quantum

[2/] For examples of the ambiguity and conflict which result from the Patterson test, see, e.g., United States v. Jackson, 487 F. 2d 852 (6th Cir. 1978); Berrier v. Egeler, 583 F. 2d 515 (6th Cir. 1978); Wright v. Smith, 569 F. 2d 1188 (2nd Cir. 1978); Grace v. Hopper, 566 F. 2d 507 (5th Cir. 1978).

of proof on particular issues the prosecution must prove. Prosecutors may just as likely object to jury instructions which unduly increase the burden on the prosecution or unfairly lessen a defendant's burden of production or burden of proof as to an affirmative defense. Thus, it is to this Court that the judiciary looks for guidance in an area of compelling importance and immediacy.

The instant case presents an ideal vehicle for the Court to clarify the rule, announced in Winship, Mullaney and Patterson and to provide the sorely needed guidance to the courts below. In this case, petitioner alleged that he was entrapped into committing the charged offenses. At issue, here, is the trial court's instruction which petitioner asserts unconstitutionally relieved the prosecution from proving all the essential facts of the crimes charged and effectively shifted the burden to the petitioner to prove the absence of criminal purpose.

In the instant case, after the trial court explained to the jury that "[t]he defendant denies that he formed a purpose to commit a crime" (T. 310), the court then instructed the jury on the theory and elements of entrapment (T. 311). In concluding, the trial court instructed that:

> "If you find by credible evidence that the defendant had criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts

for which he was both apt and willing, then he has not been unlawfully entrapped." (T. 311) (Emphasis added).

The "credible evidence" instruction certainly resulted in a reduction of the prosecution's burden of proving, beyond a reasonable doubt, every fact necessary to constitute the crimes with which the petitioner was charged. Indeed, "credible evidence" connotes a quantum of proof well below preponderance of the evidence.

Furthermore, the prejudice caused by the "credible evidence" instruction was further exacerbated by the trial court's instruction on the element "knowingly" which commenced: "A person acts knowingly, regardless of his purpose..." (T. 308) (emphasis added) and which clearly contradicted the court's later explanation that "entrapment is a denial of general criminal purpose...." (T. 311). The court also included an instruction on "purpose" which seemingly negated the entire defense of entrapment: "Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result of engaging in specific conduct."[3] (T. 312). Thus, the trial court's "credible evidence" instruction, even when viewed

[3] Petitioner specifically objected to the conflict between the "purpose" instruction and the entrapment instruction. (T. 265, 316).

with the jury instructions as a whole, would have caused a reasonable juror to assume that the prosecution was not required to prove predisposition beyond a reasonable doubt.[4]

Ohio law recognizes entrapment as a defense under the rationale first advanced by this Court in Sorrells v. United States, 287 U.S. 435 (1932) and repeated in subsequent decisions of this Court.[5]

> "Thus, the thrust of the entrapment defense was held to focus on the intent or predisposition of the defendant to commit the crime." United States v. Russell, 411 U.S. 423, 429 (1973).

Similarly, Ohio courts have held that:

> "Relevant to the issue [of entrapment] is the predisposition and willingness of the accused to commit the crime and the criminal design of the accused.

[4] Cf. Sandstrom v. Montana, supra, ___ U.S. ___, 47 U.S.L.W. 4719; Cool v. United States, 409 U.S. 100 (1972).

[5] See, Sherman v. United States, 356 U.S. 369 (1958); United States v. Russell, 411 U.S. 423 (1973); Hampton v. United States, 425 U.S. 484 (1976).

"The rule has been stated that there is no entrapment where criminal intent originates in the mind of the accused and authorities merely afford opportunities or facilities for commission of the offense." State v. Dutton Drugs, Inc., 3 Ohio App. 2d 118, 121, 209 N.E. 2d 597, 599 (Meigs Cty. 1965)(Citations omitted).

Entrapment under Ohio law, consistent with the emphasis placed on the intent or predisposition of the accused to commit the crime, is not considered an affirmative defense but, rather, represents a denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged. State v. Poole, 33 Ohio St. 2d 18, 294 N.E. 2d 888 (1973). The Ohio Supreme Court has distinguished the concept of entrapment, as well as alibi and accident, from affirmative defenses such as insanity and self-defense on the basis that the former are not "justifications for admitted conduct." See, State v. Robinson, 47 Ohio St. 2d 103, 108, 351 N.E. 2d 88, 92 (1976); State v. Poole, supra, 33 Ohio St. 2d 18, 294 N.E. 2d 888. 6/

6/ Ohio courts' interpretation of entrapment arguably places this case within the ambit of In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975) and removes it from the "exception" established under Patterson v. New York, 432 U.S. 197 (1977). Cf. Berrier v. Egeler, 583 F. 2d 515 (6th Cir. 1978), cert. denied, ___U.S.___, 99 S.Ct. 354 (1978).

At trial, petitioner's evidence of his unblemished reputation in the community (see e.g., T. 179-184, 198-202) and the persistent entreaties by the drug enforcement agent to the petitioner to obtain drugs for the agent, (see, e.g., T. 59-91, 184-198, 208-234), clearly raised an issue of entrapment under Ohio law. The record discloses that the jury was deeply concerned by the entrapment issue and posed questions to the trial court concerning the defense. In fact, the jury's request for facts concerning the agent's telephone calls to the petitioner and whether the petitioner received any money from the drug transactions (T. 317) amply demonstrates how crucial the trial court's instructions were in determining the burden of proof and the ultimate question of petitioner's guilt or innocence. Petitioner's evidence supported a conclusion that, under Ohio law, he had had no criminal purpose but rather had been entrapped.

Moreover, the Ohio courts' interpretation of the entrapment defense and its negating effect upon the element of intent or purpose is consistent with this Court's interpretation of the entrapment defense. This Court, in Sorrells v. United States, 287 U.S. 435 (1932), Sherman v. United States, 356 U.S. 369 (1958), United States v. Russell, 411 U.S. 423 (1971) and Hampton v. United States, 425 U.S. 484 (1976), has repeatedly emphasized that the entrapment defense is based upon a statutory construction of the criminal statutes. In Sherman v. United States, supra, 356 U.S. at 372, the Court stated that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." The Court has

continued "to focus on the intent or predisposition of the defendant to commit the crime." United States v. Russell, supra, 411 U.S. at 429. Entrapment is established only by the negation, or absence, of the predisposition of the defendant to commit the crime. See, Hampton v. United States, supra, 425 U.S. at 488-489.

The importance of the defense of entrapment to an orderly and fair system of criminal justice cannot be questioned. However, a defendant might well be completely foreclosed from vindicating his innocence by the improper shifting, or lowering of the burden of proof. Such a result, because of the very nature of the defense of entrapment - to protect the unwary innocent from conviction for crimes manufactured by government officials - would not only unjustly deprive an innocent of his liberty but would undermine the criminal justice system.

Thus, even if Ohio law did not recognize entrapment as a device negating or denying the essential elements of the crime, this Court's view of entrapment would compel review in this case pursuant to the admonition in Patterson v. New York, supra, 432 U.S. at 210, that although state legislatures may be permitted "to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes," "...there are obviously constitutional limits beyond which the States may not go in this regard."

CONCLUSION

The Court in In re Winship, supra, recognized society's interests in the reliability of jury verdicts in criminal cases:

> "The requirement of proof beyond a reasonable doubt has [a] vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by conviction....As we said in Speiser v. Randall,
>
> > 'There is always in litigation a margin of error, representing error in fact-finding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the fact-finder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that

> no man shall lose his liberty unless the Government has borne the burden of * * * convincing the factfinder of his guilt.'
>
> "To this end, the reasonable-doubt standard is indispensable...." 397 U.S. at 363-364 (citations omitted).

In this case, petitioner's convictions were achieved only by unconstitutionally diluting the reasonable-doubt standard on a fact necessary to constitute the crimes with which he was charged. Furthermore, it cannot be said that the unjust result in the instant case was an isolated aberration. Trial and appellate courts are presently in dire need of the clarification and guidance which can be supplied only by this Court on a question of pressing importance to the system of criminal justice.

Therefore, petitioner respectfully urges this Court, for all the foregoing reasons, to grant a writ of certiorari.

Respectfully submitted,

BERNARD A. BERKMAN
Attorney for Petitioner

APPENDIX

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-1009

DONALD T. EMERY,

Petitioner,

v.

OHIO

ORDER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 10, 1979.

/S/_____
Potter Stewart
Associate Justice of
the Supreme Court of
the United States

Dated this 21st
day of May, 1979.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
City of Columbus) 1979 Term

To-wit: March 2, 1979

The State of Ohio,)
Appellee,)
)
vs.) No. 78-1265
)
Donald T. Emery,) REHEARING
Appellant.)

It is ordered by the court that rehearing in this case is denied.

I, THOMAS J. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copies from the records of said Court, to wit, from Journal No.___ Page ____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 2nd day of March, 1979.

THOMAS L. STARTZMAN Clerk

By /S/_____ Deputy
Sam F. Adkins

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,) 1979 Term
City of Columbus)

To wit: January 17, 1979

State of Ohio,)
Appellee,) No. 78-1265
)
vs.) APPEAL FROM THE
) COURT OF APPEALS
Donald T. Emery,)
Appellant.) for Wayne County

This cause, here on appeal as of right from the Court of Appeals for Wayne County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Wayne County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this 2nd day of March, 1979

Thomas L. Startzman, Clerk

/S/_____, Deputy
Sam F. Adkins

STATE OF OHIO)		IN THE COURT OF
)	SS:	APPEALS, NINTH
WAYNE COUNTY)		JUDICIAL DISTRICT

STATE OF OHIO	)	C.A. No. 1553
Plaintiff-Appellee	)	
	)	APPEAL FROM JUDGMENT
v.	)	ENTERED IN THE COURT
	)	OF COMMON PLEAS OF
DONALD T. EMERY	)	WAYNE COUNTY, OHIO
Defendant-Appellant	)	CASE NO. 77 CR 131
	)	and 77 CR 157

DECISION AND JOURNAL ENTRY

Dated: August 23, 1978

This cause was heard May 26, 1978, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

PER CURIAM

Defendant-appellant, Donald T. Emery, appeals his jury convictions for trafficking in marijuana in an amount equal to or exceeding three times the bulk amount in violation of R.C. 2925.03(A)(7); and for trafficking in drugs in an amount not exceeding three times the bulk amount in violation of R.C. 2925.03(A)(1). We affirm.

FACTS

The defendant's arrest was the result of undercover work performed by David B. Smith, a "Medway" enforcement group agent. The defendant claimed he was entrapped by Smith.

ASSIGNMENT OF ERROR I

"The judgment is against the weight of the evidence."

The defendant says that there is no probative evidence whether the substance involved in case no. 77-CR-131 is a resin preparation, for which the bulk amount is ten grams, R.C. 2925.01(E)(3), or a resin concentrate, for which the bulk amount is two grams under the same statute. The defendant was indicted for the knowing sale of marijuana resin preparation in an amount equal to or exceeding three times the bulk amount as defined in R.C. 2925.01 in violation of R.C. 2925.03(A)(7). R.C. 2925.01(E)(3) defines the bulk amount as:

> "An amount equal to or exceeding two hundred grams of marihuana, [sic] or an amount equal to or exceeding ten grams of the resin contained in marihuana, [sic] or of any extraction or preparation of such resin, or equal to or exceeding two grams of such resin in a liquid concentrate, liquid extract, or liquid distillate form;"

The substance sold by the defendant weighs 23.3 grams. The B.C.I. analyst

stated that the substance appeared under visual observation to be a heavy liquid which poured out of its container, although some had to be scraped out of the container. Two chemical analyses were performed on the substance. At various points in the analyst's testimony, the substance was described in the following terms:

> "***a liquid concentrated marijuana resin preparation***,"
>
> "***a liquid concentrate***; a preparation [of a cannobanoid resin]***; a resin preparation and a liquid concentrate***; a resin preparation***a concentrated form***; a very concentrated liquid resin preparation of the plant, marijuana."

Over objection, the court charged the jury that in order to convict, they would have to find beyond a reasonable doubt that

> "***the defendant knowingly sold marijuana resin preparation and that the marijuana resin preparation was in a liquid concentrate, liquid extract or liquid distillate form,***"

Although the testimony is not as clear as it might be, the analyst was consistent in his opinion that the substance is a liquid concentrate, and not mere resin or resin preparation. The defendant argues that there is no scientific basis for this opinion. This assertion is

prompted by the defendant's opinion of the nature and reliability of the tests employed by the analyst, in which opinion the analyst did not concur. We find that the verdict is supported by sufficient evidence.

In State v. McDonald, 32 Ohio App. 2d 231 (1972), we defined the circumstances in which entrapment does or does not occur. We find that there is sufficient evidence to overcome defendant's claim of entrapment.

ASSIGNMENT OF ERROR II

> "The trial court erred in its charge to the jury on entrapment."

The defendant objects to the following portion of the charge:

> "***".
>
> "If you find by credible evidence that the defendant had the predisposition and criminal design to commit the acts into which he claims he was entrapped, and that he was merely provided with an opportunity to commit those acts for which he was both apt and willing, then he has not been unlawfully entrapped.***"

The defendant says that this phraseology permits the state to establish predisposition by the preponderance of the evidence, in violation of the principle that

the state bears the burden of disproving an affirmative defense, including entrapment, beyond a reasonable doubt once the defendant has met his burden of going forward with the evidence. In State v. McNamara, No. 1539 (9th Dist. Ct. App., August 23, 1978), we found that entrapment is an affirmative defense under R.C. 2901.05. We further noted that the state does not bear the burden of disproving that defense beyond a reasonable doubt. State v. Abner, 55 Ohio St. 2d 251 (1978).

The portion of the charge objected to by the defendant is drawn almost word for word from the third syllabus of our decision in State v. McDonald, supra. We adhere to that decision. We believe the defendant has failed to consider the portion of the charge he objects to in the context of the charge as a whole. An examination of the charge as a whole shows that the trial court charged in conformity with the guidelines set forth in State v. Robinson, supra. See, State v. Cook, No. 1548 (9th Dist. Ct. App., August 23, 1978); State v. McNamara, supra. Further, nothing in McDonald, supra, attempts to alter the state's burden of proving an accused's guilt beyond a reasonable doubt.

ASSIGNMENT OF ERROR III

> "The trial court erred in failing to suppress, and is admitting over defendant's objection, evidence secured by means of entrapment."

The defendant presents a novel argument that probable cause is, or should

be, a prerequisite to police participation in entrapping techniques, with an exclusionary rule operating to exclude evidence gathered when no probable cause is present. This scheme would be implemented, the defendant asserts, by prior determinations by impartial magistrates, or by ex post facto determinations at a hearing on a motion to suppress, or at trial. We are not persuaded, however, to launch this experiment.

ASSIGNMENT OF ERROR IV

> "The trial court erred in failing to grant defendant's motion to dismiss at the close of state's evidence and in instructing the jury with respect to whether the substance in Case No. 77-CR-131 was a resin preparation or a resin concentrate."

This question was considered under the first assignment of error.

ASSIGNMENT OF ERROR V

> "The trial court erred in failing to suppress and in admitting over defendant's objection evidence of incriminating statements of defendant."

At issue here is the discoverability or non-discoverability of certain utterances made by the defendant to Smith during course of Smith's undercover work and during the drug transactions. Crim. R. 16(B)(1)(a)(i), (ii) states:

"Disclosure of evidence by the prosecuting attorney. (1) Information subject to disclosure. (a) Statement of defendant or co-defendant. Upon motion of the defendant, the court shall order the prosecuting attorney to permit the defendant to inspect***copy or photograph any of the following which are available to, or within the possession, custody or control of the state, the existence of which is known or by the exercise of due diligence may become known to the prosecuting attorney: (i) Relevant written or recorded statements made by the defendant or***or copies thereof; (ii) Written summaries of any oral statement, or copies thereof, made by the defendant or***to a prosecuting attorney or any law enforcement officer;"

The defendant filed a demand for discovery which included a request for materials encompassed by this rule. The prosecution's response indicated that no such materials were in the custody of the prosecutor's office. The defendant thereupon filed a motion for discovery. This motion focused upon the alleged failure of the prosecutor to allow the defendant access to test results or reports prepared by a B.C.I. analyst. At a hearing conducted on defendant's motions for a bill of particulars, suppression, and discovery, the focus of inquiry on the discovery motion expanded to include statements of the defendant. It developed that the undercover agent had

written down conversations between he and the defendant which took place during the course of the investigation and during the crimes. These conversations were recorded as part of the "buy reports" prepared by Smith. The prosecutor took the position that a "statement" for purposes of Crim. R. 16 is a narration, exculpatory or inculpatory, of past events. The court found that the conversations were not discoverable. The court indicated that the reports would be viewed in-camera during the trial for possible use in impeaching the witness. Smith testified during the course of this hearing. A transcript of the hearing was prepared the following day. Trial commenced some two months later.

At trial, Smith testified to conversations he had with the defendant. Defendant's motion to strike, based upon his discovery motion, was overruled. Smith was asked on cross-examination whether he had reviewed his buy reports in preparation for his appearance. Upon Smith's affirmative response, court and counsel retired to chambers for an in-camera inspection of the reports. The proceedings of that inspection were not transcribed. The record does show, however, that defense counsel was in possession of the buy report subsequent to the in-camera inspection. We have not been favored with the buy report(s) as part of the record on appeal. Defense counsel was also possessed of the transcript of the pre-trial hearing. Both items were used during the cross-examination of Smith.

The defendant says that the question at issue is whether the word "statements", as used in Crim. R. 16(B)(1)(a), include utterances made contemporaneous with the offense, as well as those made after the offense. The state asserts that so-called "res gestae" utterances are not encompassed by the term "statements" as used in Crim. R. 16(B)(1)(a).

Prior to the adoption of the Criminal Rules, the question whether the state would be required to provide discovery of the defendant's own statements rested in the sound discretion of the trial court. State v. White, 15 Ohio St. 2d 146, 159 (1968); State v. Corkran, 3 Ohio St. 2d 125 (1965). The language of Crim. R. 16 (B)(1)(a), however, is not qualified by words importing discretion on the trial court's part in deciding whether available statements shall be provided to the defendant. Unless a protective order is issued pursuant to Crim. R. 16(E)(1), they must be provided. See, State v. Hall, 48 Ohio St. 2d 325 (1976); State v. Smith, 50 Ohio App. 2d 183 (1976).

We hold that the term "statements" as used in Crim. R. 16(B)(1)(a) include declarations contemporaneous with an event. In State v. Byars, No. 8543 (9th Dist. Ct. App. December 21, 1977), we found reversible error in the trial court's failure to grant a motion for discovery of summaries of the defendant's own statements and of statements made by co-defendants. We quote from Byars:

> "The summaries in issue are based upon statements made by the defendants to undercover police officers and are contained in confidential reports to supervisory police officials."

This interpretation is consistent with the federal view. See, e.g., United States v. Walker, 538 F. 2d 266, 268 (9th Cir. 1976); United States v. James, 495 F. 2d 434, 436 (5th Cir. 1974), cert. denied 419 U.S. 899 (1974); United States v. Bryant, 439 F. 2d 642, 649-50 (D.C. Cir. 1971); Davis v. United States, 413 F. 2d 1226, 1231 (5th Cir. 1969); United States v. Isa, 413 F. 2d 244, 246-249 (7th Cir. 1969). We agree, however, with the distinction made in United States v. Green, 548 F. 2d 1261, 1267 (6th Cir. 1977). There, the court held undiscoverable "spontaneous, unsolicited admissions, made within hearing of an undercover police officer." These declarations were contrasted with answers by the defendant to direct questions propounded by a government agent.

We find that "statements" of the defendant, or summaries thereof, were available to the prosecutor. It is irrelevant that they were not on tape. See, United States v. Villa, 370 F. Supp. 515, 518-519 (D.C. D. Conn. 1974). We conclude, therefore, that the trial court erred in not ordering the state to produce the statements. We add that it is irrelevant how the reports containing such statements or summaries thereof are denominated. If there is concern that information not subject to disclosure is part of the report, the trial court has full authority to examine the report and order privileged material excised. See United States v. Villa, supra, at 520.

The question remains whether the error is prejudicial. Crim. R. 52(A); See, State v. Cooper, 52 Ohio St. 2d 163, 177 (1977). We conclude that it was not. We do not base this determination upon the mere receipt of the buy report by the defendant during the trial. The possibility of gaining access to statements through the mechanism of Crim. R. 16(B)(1)(g) is no substitute for pre-trial discovery mandated by Crim. R. 16(B)(1)(a). Our determination that no prejudicial error occurred is based upon a comparison between Smith's testimony at the pre-trial hearing and his trial testimony. First, Smith's testimony at trial concerning admissions made by the defendant on October 8, 1977, concerning "seven-fourteens" and defendant's query whether Smith was "interested in marijuana" is not present in the hearing transcript. We find, however, that this testimony relates to "unsolicited admissions made within hearing of an undercover police officer", United States v. Green, supra at 1267, and are not "statements" under Crim. R. 16(B)(1)(a). At trial, Smith testified to two statements of the defendant which are not present in the transcript of the hearing. These concern an alleged telephone conversation between Smith and the defendant on October 21 concerning the time they would meet and defendant's ability to procure a quarter ounce of cocaine and forty pounds of marijuana. The remaining statements of the defendant contained in Smith's trial testimony are substantially present in Smith's testimony at the hearing. We do

not believe the defendant was prejudiced by the trial court's ruling due to the availability to him of the pre-trial hearing transcript. See, State v. Broyles, 559 S.W. 2d 614 (Mo. App. 1977). Further, there was no motion for a continuance made by the defendant during trial. In short, we find that fundamental fairness does not require the granting of a new trial.

SUMMARY

We overrule all assignments of error and affirm the judgment

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Wayne County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

/S/Edward J. Mahoney
Presiding Judge
- for the Court -

MAHONEY, P.J.
VICTOR, J.
HUNSICKER, J.
CONCUR

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

APPEARANCES:

ROBERT N. GLUCK, Asst. Prosecuting Attorney, Silver Building, Public Square, Wooster, Ohio 44691 for Plaintiff-Appellee.

ALLEN SCHULMAN, JR., Attorney at Law, Schulman & Figler, 636 Citizens Savings Building, Canton, Ohio 44702 for Defendant-Appellant.

IN THE COMMON PLEAS COURT
OF WAYNE COUNTY, OHIO

STATE OF OHIO, Plaintiff,	)	Case No. 77-CR-131
vs.	)	JOURNAL ENTRY
DONALD T. EMERY, Defendant.	)	

This cause came on for trial on the 16th, 17th and 18th day of February, 1978, to a jury of twelve who were duly empaneled and sworn to well and truly try the issues joined and a true verdict render according to the evidence and the law, the defendant herein having previously entered a plea of "not guilty" to an indictment charging him with Trafficking in Drugs in violation of §2925.03(A)(7) of the Ohio Revised Code. Said defendant was represented by counsel, Attorney Allen Schulman, Jr.

After hearing the evidence, arguments of counsel, and instructions of the Court, the Jury retired to the jury room and after due deliberation returned to the Court room and presented their verdict in proper form in writing finding the defendant "guilty" as charged in the within indictment.

The Court, in coming to pass sentence, asked the defendant if he had anything to say before judgment was pronounced and the defendant being unable to show cause as to why judgment should

not now be pronounced, the Court did thereupon sentence said defendant to the Ohio State Reformatory, Mansfield, Ohio, for an indeterminate term of not less than two (2) years nor more than fifteen (15) years, with six (6) months actual incarceration. Said sentence is to be served concurrently with the sentence imposed in Case No. 77-CR-157.

The Sheriff of Wayne County, Ohio, is hereby ordered and directed to cause said defendant to be conveyed to the Ohio State Reformatory, Mansfield, Ohio, for the serving of said sentences and to make due return to this Court. It is further ordered that said defendant pay the costs of this action taxed at $_____.

/S/_____
Judge of the Common Pleas Court

APPROVED:

/S/_____
Assistant Prosecuting Attorney

IN THE COMMON PLEAS COURT
OF WAYNE COUNTY, OHIO

STATE OF OHIO, Plaintiff,	)	Case No. 77-CR-157
vs.	)	JOURNAL ENTRY
DONALT T. EMERY, Defendant.	)	

This cause came on for trial on the 16th, 17th and 18th day of February, 1978, to a jury of twelve who were duly empaneled and sworn to well and truly try the issues joined and a true verdict render according to the evidence and the law, the defendant herein having previously entered a plea of "not guilty" to an indictment charging him with Trafficking in Drugs in violation of §2925.03(A)(1) of the Ohio Revised Code. Said defendant was represented by counsel, Attorney Allen Schulman, Jr.

After hearing the evidence, arguments of counsel, and instructions of the Court, the Jury retired to the jury room and after due deliberation returned to the Court room and presneted their verdict in proper form in writing finding the defendant "guilty" as charged in the within indictment.

The Court, in coming to pass sentence, asked the defendant if he had anything to say before judgment was pronounced and the defendant being unable to show cause as to why judgment should not now be pronounced, the Court did thereupon

sentence said defendant to the Ohio State Reformatory, Mansfield, Ohio, for an indeterminate term of not less than two (2) years nor more than ten (10) years, said sentence to be served concurrently with the sentence imposed in Case No. 77-CR-131.

The Sheriff of Wayne County, Ohio, is hereby ordered and directed to cause said defendant to be conveyed to the Ohio State Reformatory, Mansfield, Ohio, for the serving of said sentences and to make due return to this Court. It is further ordered that said defendant pay the costs of this action taxed at $_____.

/S/_____
Judge of the Common Pleas Court

APPROVED:

/S/_____
Assistant Prosecuting Attorney

PROPOSITIONS OF LAW PRESENTED IN MEMORANDUM IN SUPPORT OF JURISDICTION TO THE SUPREME COURT OF OHIO

Proposition of Law No. I:

THE TRIAL COURT ERRED IN ITS CHARGE TO THE JURY ON THE DEFENSE OF ENTRAPMENT, BY INSTRUCTING THE JURY THAT THE STATE COULD OVERCOME THE DEFENSE OF ENTRAPMENT BY "CREDIBLE EVIDENCE".

* * *

ASSIGNMENTS OF ERROR TO OHIO COURT OF APPEALS, NINTH APPELLATE DISTRICT

I. The judgment is against the weight of the evidence.

II. The trial court erred in its charge to the jury on entrapment.

III. The trial court erred in failing to suppress, and in admitting over defendant's objection, evidence secured by means of entrapment.

IV. The trial court erred in failing to grant defendant's motion to dismiss at the close of state's evidence and in instructing the jury with respect to whether the substance in Case No. 77-CR-131 was a resin preparation or a resin concentrate.

V. The trial court erred in failing to suppress and in admitting over defendant's objection evidence of incriminating statements of defendant.

CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO REVISED CODE

§2925.03 Trafficking in drugs.

(A) No person shall knowingly do any of the following:

(1) Sell or offer to sell a controlled substance in an amount less than the minimum bulk amount as defined in section 2925.01 of the Revised Code;

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution or distribute a controlled substance, when the offender knows or has reasonable cause to believe such drug is intended for sale or resale by the offender or another;

(3) Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(5) Sell or offer to sell a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;

(6) Possess a controlled substance in an amount equal to or exceeding three times the bulk amount;

(7) Sell or offer to sell a controlled substance in an amount equal to or exceeding three times the bulk amount;

(8) Provide money or other items of value to another person with the purpose that the recipient of the money or items of value would use them to obtain controlled substances for the purpose of selling or offering to sell such controlled substances in amounts exceeding a bulk amount or for the purpose of violating division (A)(3) of this section.

(B) This section does not apply to manufacturers, practioners, pharmacists, owners of pharmacies, and other persons whose conduct is in accordance with Chapters 3719., 4715., 4729., 4731., and 4741. of the Revised Code.

(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I with the exception of marihuana or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(2) Where the offender has violated division (A)(2) of this section, aggravated trafficking is a felony of the third degree, and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree.

(3) Where the offender has violated division (A)(3) of this section, aggravated trafficking is a felony of the second degree and the court shall impose

a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years.

(4) Where the offender has violated division (A)(4) of this section, aggravated trafficking is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(5) Where the offender has violated division (A)(5) or (A)(6) of this section, aggravated trafficking is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years and if the offender has previously been convicted of a felony drug abuse offense, aggravated trafficking is a felony of the first degree, and the court shall impose a sentence of actual incarceration of five years.

(6) Where the offender has violated division (A)(7) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of at least seven years.

(7) Where the offender has violated division (A)(8) of this section, aggravated trafficking is a felony of the first degree and the court shall impose a sentence of actual incarceration of seven years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of ten years.

(D) If the drug involved is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates this section is guilty of trafficking drugs.

(1) Where the offender has violated division (A)(1) or (A)(2) of this section, trafficking in drugs is a felony of the fourth degree and if the offender has previously been convicted of a drug abuse offense, trafficking in drugs is a felony of the third degree.

(2) Where the offender has violated division (A)(3) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(3) Where the offender has violated division (A)(4) of this section, trafficking in drugs is a felony of the fourth degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse

offense, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months.

(4) Where the offender has violated division (A)(5) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of one year and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years.

(5) Where the offender has violated division (A)(6) of this section, trafficking in drugs is a felony of the third degree and the court shall impose a sentence of actual incarceration of eighteen months and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of three years.

(6) Where the offender has violated division (A)(7) of this section, trafficking in drugs is a felony of the second degree and the court shall impose a sentence of actual incarceration of two years and if the offender has previously been convicted of a felony drug abuse offense, trafficking in drugs is a felony of the first degree and the court shall impose a sentence of actual incarceration of four years.

(7) Where the offender has violated division (A)(8) of this section, trafficking in drugs is a felony of the

first degree and the court shall impose a sentence of actual incarceration of five years and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of seven years.

(E) If the drug involved is marihuana, whoever violates this section is guilty of trafficking in marihuana.

(1) Where the offender has violated division (A)(1), (A)(2), (A)(3), or (A)(4) of this section, trafficking in marihuana is a felony of the fourth degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the third degree.

(2) Where the offender has violated division (A)(5) or (A)(6) of this section, trafficking in marihuana is a felony of the third degree and if the offender has previously been convicted of a felony drug abuse offense, trafficking in marihuana is a felony of the second degree.

(3) Where the offender has violated division (A)(7) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of six months and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of one year.

(4) Where the offender has violated division (A)(8) of this section, trafficking in marihuana is a felony of the second degree and the court shall impose a sentence of actual incarceration of one

year, and if the offender has previously been convicted of a felony drug abuse offense, the court shall impose a sentence of actual incarceration of two years.

(5) If the offense involves a gift of twenty grams or less of marihuana, trafficking in marihuana is a minor misdemeanor for the first offense and a misdemeanor of the third degree for any subsequent offense.

(F) It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for possessing a bulk amount of a controlled substance or for cultivating marihuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substnace was solely for personal use.

(G) When a person is charged with possessing a bulk amount or a multiple thereof, the jury, or the court trying the accused shall determine the amount of the controlled substance involved at the time of the offense, and if a guilty verdict is returned shall return the findings as part of the verdict. In any such case, it is unnecessary to find and return the exact amount of the controlled substance and it is sufficient if the finding and return is to the effect that the amount of the controlled substance involved is a bulk amount or the requisite multiple thereof, or that the amount of the controlled substance involved is less than a bulk amount or the requisite multiple thereof.